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In The

Supreme Court of the United States

UNIVERSITY OF ALABAMA AT BIRMINGHAM BOARD OF TRUSTEES, et al.,

Petitioners,

v.

PATRICIA GARRETT, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF *AMICUS CURIAE*, THE ASSOCIATION OF STATE CORRECTIONAL ADMINISTRATORS, IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Eleventh Amendment to the United States Constitution bars suits by private citizens in federal court under the Americans with Disabilities Act against non-consenting states.

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INTEREST OF *AMICUS CURIAE*[1]

The Association of State Correctional Administrators ("ASCA") is a professional association whose membership includes the Directors of the fifty state Departments of Corrections, Puerto Rico, the United States Virgin Islands, and four large urban correctional systems (Cook County, Illinois; New York City, New York; Philadelphia, Pennsylvania; and Washington, D.C.). Through these top correctional administrators, ASCA seeks the improvement of correctional services and practices.[2]

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[1] The Association of State Correctional Administrators files this brief as *amicus curiae* in support of Petitioner, pursuant to Sup. Ct. R. 37.2. A letter of the Petitioner, dated June 7, 2000, a letter of the Respondent, dated June 7, 2000, and a letter of Intervenor United States, dated June 13, 2000, by which counsel for the parties evidenced their consent to the filing of this brief, have been filed with this Court.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation and submission of this brief.

[2] ASCA's mission is to improve correctional services and practices by promoting and facilitating:

> (1) the exchange of ideas and philosophies at the top administrative level of correctional planning and policy-making;
>
> (2) the advancement of correctional techniques, particularly in the areas of program development, design of physical facilities, staff training, and correctional management facilities;
>
> (3) public support for and understanding of the criminal justice system;

As the top managers of state correctional facilities, ASCA's members bear the daily responsibility of maintaining the majority of the nation's prisoners in a safe, orderly, and secure environment. The Americans with Disabilities Act ("ADA" or "Act"), as applied to corrections employees and inmates, has been a matter of deep concern for state prison administrators, which led ASCA to adopt a resolution urging that the ADA not be applied to state and local prisons. *See ASCA Resolution, Americans with Disabilities Act* (Jan. 15, 1995).

ASCA submits this brief for the purpose of informing the Court of the ways in which the Americans with Disabilities Act seriously has burdened the efficient and proper administration of state prisons and to argue that the Act is not a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment. Therefore, pursuant to the Eleventh Amendment, the federal courts lack

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> (4) research in correctional practice, anti-social behavior, causes of crime and delinquency, and cooperation in research;
>
> (5) the development and application of correctional standards and accreditation;
>
> (6) the fostering of legislative and other measures designed to accomplish th[ese] objective[s];
>
> (7) the exchange of information with international agencies and organizations interested in correctional programs; and
>
> (8) the undertaking of such work and projects of an allied character as may be authorized by the membership.

Letter from George Camp, Executive Director, *The Association of State Correctional Administrators* 1 (Feb. 6, 1998).

jurisdiction over such claims in the absence of consent by the state. The members of ASCA firmly believe that the ADA severely undermines their public duties as state officials.

STATEMENT OF FACTS RELATING TO STATE PRISON SYSTEMS

In the United States, there are currently over 1,000,000 inmates confined in state prisons, which employ 383,028 staff members (330,862 institutional staff, 23,884 central/regional office staff, and 28,282 other staff). *See* CAMILLE GRAHAM CAMP & GEORGE M. CAMP, THE CORRECTIONS YEARBOOK 1998, 1-9, 138 (Criminal Justice Institute 1998) (hereinafter CORRECTIONS YEARBOOK) (As of January 1, 1998, there were 1,038,158 inmates confined in prisons administered by the states and Washington, D.C. There were 101,441 inmates confined in the Federal Prisons. In addition, 29,203 inmates under state correctional control were confined in other facilities, such as hospitals or community-based programs; 39,988 state prisoners were housed in local jails, often due to crowding; and 40,805 inmates were held in contracted facilities. These statistics do not include those inmates otherwise required to be incarcerated in local jails, such as pretrial detainees and inmates serving short sentences). Requiring the state prison administrators to comply with the regulatory scheme of the ADA unduly interferes with sound prison management, precludes administrators from setting fiscal and operational priorities in the public's interest, and impermissibly infringes upon the

sovereignty of the states. This is true whether the ADA is applied to prison employees or inmates.

Applying the ADA to employees and inmates in state and local prison systems has profound implications. The ADA has very broad eligibility criteria. The term "disability" with respect to an individual includes any "physical or mental impairment that substantially limits one or more major life activities." 28 C.F.R. § 35.104 (1999). The phrase "physical or mental impairment" embraces a myriad of mild to more serious conditions and includes permanent and temporary ailments. *See id.* Such conditions encompass mental or psychological disorders (including mental retardation), emotional or mental illness, orthopedic conditions, specific learning disabilities, visual impairments, hearing impairments, heart disease, diabetes, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism. *See id.*

Prison Employees. When this broad-ranging statute is applied to prison employees, the safety of all is at stake. Corrections officers have been described accurately as having "[t]he most dangerous job in America." *See* Bruce Porter, *Terror on an Eight Hour Shift*, N.Y. Times Magazine, Nov. 26, 1995, at 44 (describing experience of correctional officer held hostage during 11-day prison riot).

Corrections officers who manage prison cellblocks are unarmed and greatly outnumbered by persons so dangerous that our society will not allow them to walk the street. The tedium of a cellblock routine has the potential to explode, no matter how assiduous correctional officials are. Prisoner assaults on corrections officers are an inevitable part of prison life. In 1997, for

example there were 13,375 assaults committed by inmates against corrections staff. *See id.* at 40. Corrections officers are expected to maintain peace, prevent escapes, and protect inmates and staff from assaults. At the same time, they are expected to ensure the delivery of wide-ranging services, such as food, medical care, education, and treatment programs.

The presence of a disabled corrections officer, whom the inmates perceive as physically, mentally, or emotionally weak, can trigger serious problems in the prison setting. Prisoners hardly can be expected to conform their opinions, conduct, and criminal plans to society's accepted views concerning the disabled. It is a fact that predatory prisoners prey on disabled prisoners. *See, e.g., Clark v. California*, 1996 U.S. Dist. LEXIS 21630 (N.D. Cal., Oct. 1, 1996) (citing instances of inmates being physically and mentally abused by the general prison population because of their disabilities); *Wilson v. Vaughn*, 1996 U.S. Dist. LEXIS 22420 (E.D. Pa. Aug. 13, 1996) (describing Department of Corrections policy designed to protect disabled inmates from dangers of general population); Sandra J. Carnahan, *The Americans With Disabilities Act in State Correctional Institutions*, 27 Cap. U.L. Rev. 291 (1996) (describing regulations designed to protect disabled inmates, who are often preyed upon by other violent and manipulative inmates). It is unreasonable to presume that these same predatory prisoners would not also prey on disabled corrections employees or attempt to exploit their physical, emotional, or mental limitations.

For these reasons, there are often difficult judgments to be made in balancing the rights of the disabled, whether employee or inmate, with the critical need for

prison security. Corrections administrators need flexibility to make these difficult judgments. While their discretion is certainly constrained by many other laws, including the federal and state constitutions, civil service laws, and state civil rights laws, the ADA and its regulations are an extreme and unjustified intrusion that commandeers the operation of state and local prisons. The ADA's highly detailed remedial scheme (designed for general employment situations) does not appropriately consider or value the inherent difficulties of the prison environment. This Court has acknowledged the difficult job facing corrections administrators and officers and deferred accordingly. *See, e.g., Hudson v. McMillian,* 503 U.S. 1, 6 (1992); *Turner v. Safley,* 482 U.S. 78, 84-85 (1987); *Whitley v. Albers,* 475 U.S. 312, 321-22 (1986); *Procunier v. Martinez,* 416 U.S. 396, 404-05 (1974).

The ADA's one-size-fits-all scheme irrationally forces corrections administrators either to compromise their security responsibilities or to risk costly and intrusive ADA litigation by the disappointed employee. Either option is a dead-weight loss on state prison systems and an unwarranted interference with these state officials' important public duties.

Prison Inmates. The Act's broad definition of disability places extreme burdens on prison systems. State correctional facilities house large number of prisoners who fall within these definitions. Indeed, inmates with past drug and alcohol dependencies are estimated to comprise 80% of prisoners. *See* THE NATIONAL CENTER ON ADDICTION AND SUBSTANCE ABUSE, BEHIND BARS: SUBSTANCE ABUSE AND AMERICA'S PRISON POPULATION (1998). Prison populations are also likely to have disabilities in proportions larger

than the general public. *See, e.g.*, Malcolm L. Lachance-McCullough & James M. Tesoriero, *AIDS, in* ENCYCLOPEDIA OF AMERICAN PRISONS (Marilyn D. McShane & Frank P. Williams III eds., 1996) ("HIV infection rates in prison exceed the general population by as much as five or six to one." A National Institute of Justice/Center for Disease Control survey "reflected an AIDS incidence rate in prison that was twenty times higher than that of the 1992 U.S. general population"); Louis and Carol Veneziano, *Disabled Inmates, in* ENCYCLOPEDIA OF AMERICAN PRISONS, *supra*, at 159 (A survey of all state and federal prison systems found that 10.7 percent of inmates have a learning disability, 4.2 percent suffer from mental retardation, 7.2 percent have psychotic disorders, and 12.0 percent have psychological disorders).

These medical issues will be exacerbated as the prison population ages. As of January 1, 1998, state correctional facilities housed 69,994 inmates age 50 years or older. *See* ENCYCLOPEDIA OF AMERICAN PRISONS, *supra*, at 24. As the median age of prisoners rises, the costs of medical care become astronomical. *See generally Prison Care – Our Penitentiaries are Turning into Nursing Homes. Can we afford it?*, MODERN MATURITY, Mar.-Apr., 1997 (citing study that a state inmate over the age of 55 costs $69,000 a year, compared to $22,000 per year for the typical adult inmate).

The heedless sweep of the ADA, as applied to prison contexts, defies common sense and the Constitiution. Not only does the Act cover a wide range of conditions, it also covers those individuals who are related to the prisoner, including a "visitor, spectator, family member, or associate of a 'prisoner' with a disability." U.S. DEPARTMENT OF

JUSTICE, THE AMERICANS WITH DISABILITIES ACT: TITLE II TECHNICAL ASSISTANCE MANUAL (1992) II-2.8000. The Act, at least as interpreted by the Department of Justice, operates at an astonishing level of specificity, dictating specific standards for valet parking, carpet depth, flash rates of visual alarms, bathrooms, numbers of water fountains, seating areas, areas of refuge, and specifications for curb ramps, among others. *See id.* at II-6.3200.

The ADA requires the following benefits for prisoners, among others:

> The regulatory scheme of the ADA creates an affirmative obligation on state correctional departments to provide, *at state taxpayer expense*, "modifications to rules, policies, or practices, the removal of architectural barriers, or the provision of auxiliary aids and services." 42 U.S.C. § 12131(2) (1999).
>
> State correctional departments are required, with limited exceptions, to *ensure* that disabled prisoners participate in and receive the "benefits of services, programs, or activities." 42 U.S.C. § 12132 (1999).
>
> Title II *requires* that state correctional officials appoint and pay for an ADA coordinator to coordinate ADA efforts for the corrections department and investigate ADA complaints. *See* 28 C.F.R. § 35.107 (1999).[3]

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[3] Section 35.107 states:

> A public entity that employs 50 or more persons shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any

> If a state corrections department substantially renovates an old facility, *the department must make substantial architectural changes to the facility*. *See* 42 U.S.C. § 12183(a)(2) (1999).
>
> The regulation establishes strict standards for new construction or alternatives – *specifically, all facilities altered by a state corrections department must be "readily accessible and usable by individual with disabilities."* 28 C.F.R. § 35.151 (1999).

A state corrections department *must* choose from two design standards:

a. the Uniform Federal Accessibility Standards ("UFAS"), which requires, for example, that *five percent of all residential units* in correctional facilities be accessible *regardless of whether the state corrections department needs that number of accessible cells in each state prison*. *See* UFAS, Section 4.1.4 (9)(c) (1999); or

b. the American with Disabilities Act Accessibility Guidelines for Buildings or Facilities ("ADAAG"), which requires, for example, that state correctional facilities spend *up to*

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investigation of any complaint communicated to it alleging noncompliance with this part or alleging any actions that would be prohibited by this part. The public entity shall make available to all interested individuals the name, office address, and telephone number of the employee or employees designated pursuant to this paragraph. 28 C.F.R. § 35.107(a) (1999).

> *twenty percent of their overall alteration expenditures* to establish a "path of travel" in specified areas. *See* ADAAG, 4.1.6(2); 28 C.F.R. § 36.403(f) (1999).

Prison budgets consume huge portions of state budgets. For the fiscal year of 1998, state correctional agency budgets exceeded $27 billion. *See* CORRECTIONS YEARBOOK, *supra* at 86-87 (stating that state correctional budgets for the fiscal year of 1998 were $27,834,553,716, including both operating and capital expenses).

Because prisoners compose the segment of our society that is guaranteed adequate medical care, state correctional departments spend over $2 billion annually for medical operating expenses. *See id.* at 86-87 (stating that state correction operating budgets for medical services in the fiscal year of 1998 were $2,620,753,034). Given these huge costs, corrections departments bear the heavy duty to spend state taxpayer dollars in the most cost effective way, a state sovereign function undermined by the ADA.

The ADA regulatory scheme severely interferes with a state's ability to set its own operational and fiscal priorities in managing disabled prisoners. For example, 28 C.F.R. § 35.130, prohibits prison officials from denying a disabled prisoner "the opportunity to participate in services, programs, or activities that are not separate and different, despite the existence of permissibly separate or different programs or activities." 28 C.F.R. § 35.130(b)(2) (1999). In other words, disabled prisoners are expected to be mainstreamed into the general prison population. *See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999) (holding that public service portions of the ADA require states to provide community-based treatment for persons with

mental disabilities); *Armstrong v. Wilson*, 942 F. Supp. 1252 (N.D. Cal. 1996), *aff'd*, 124 F.3d 1019 (9th Cir. 1997) (recognizing that the ADA requires public entities to provide services in the most integrated setting appropriate, even though plaintiffs did not object to the concentration of inmates and resources at particular institutions, provided that this was done "in a manner consistent with the ADA"). Under this provision, advocates of the disabled have argued that state officials cannot cluster specialized services for disabled prisoners in certain prison facilities. Rather, they are required to make such services available for each and every state prisoner. This federal directive prohibits the state from conserving state tax dollars by clustering mental health treatment facilities, services for hearing impaired inmates, drug and alcohol programs, or dialysis treatment.

Lower courts have held that the ADA precludes the clustering of similarly afflicted disabled prisoners for treatment or services. *See, e.g., Onishea v. Hopper*, 171 F. 3d 1289, 1298 (11th Cir. 1999); *Carty v. Farrelly*, 957 F.Supp. 727 (D.V.I. 1997); *Armstrong v. Wilson*, 942 F. Supp. 1252 (N.D. Cal. 1996). Yet, sound correctional practice suggests that some disabled prisoners should be segregated from other prisoners to prevent victimization. *See, e.g.*, STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS 3-4145 (American Correctional Assoc., 1990) (requiring that handicapped inmates must be "housed in a manner that provides for their safety and security"); SUPPLEMENTAL STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS 3-4128-2 (American Correctional Assoc., 1998) (recommending that all adult correctional facilities establish written policies

practices and procedures to provide that single occupancy cells are available for inmates with severe medical disabilities, inmates "suffering from serious mental illness," inmates who are likely to be "exploited or victimized by other[s]" and inmates who have "other special needs for single housing").

Indeed, prison officials are caught in a catch-22: the ADA subjects them to liability for separating disabled prisoners while the Constitution subjects them to liability for *failing* to segregate and protect disabled inmates from other prisoners who could harm them. *See Carty v. Farrelly*, 957 F. Supp. 727, 741 (D.V.I. 1997) (holding that placing an inmate who used a cane in a housing cluster designed for mentally ill prisoners violated the ADA); *Love v. Westville Correctional Center*, 103 F.3d 558 (7th Cir. 1996) (upholding damages and attorneys fees under the ADA where correction center housed wheelchair bound inmate in an infirmary).

Because the Act attempts to treat differently situated prisoners in a similar fashion, it causes absurd results. As a result of the ADA's breadth, it covers the prison systems' oversight of both housing and medical treatment. The ADA, literally applied, would preclude removing a prisoner from one housing location based upon a disability, such as renal disease, even though it is more cost effective to treat all renal disease in one location. The ADA would require the prison to modify its existing practices at the current housing location unless it could establish that the modification (providing dialysis treatment at the current institution) would fundamentally alter the nature of the existing program. The rigidity of the ADA, especially as interpreted by the Department of

Justice, does not accommodate the necessary considerations in a prison context. It is blind to the fact that the clustering of prisoners with similar medical needs will provide greater overall benefits to the prisoner, the prison system, and the taxpayer.

The ADA's inflexible regulatory scheme ignores the well-established and reasonable prison classification programs that routinely examine factors such as mental health, mental retardation, and prior drug, and alcohol abuse to determine prisoner classifications and placements. *See, e.g.*, STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS 3-4292 (American Correctional Assoc., 1990) (recommending the use of a classification system that considers drug and alcohol addiction, metal retardation, whether the inmate is emotionally disturbed or suspected of being mentally ill, or other needs for protective custody); *id.* at 3-4128-1 (classification system must evaluate mental and emotional stability and medical status). Through such classification procedures, prisons match prisoner security requirements and programmatic needs with an appropriate facility or program placement. Adult correctional facilities often cluster inmates with chronic mental health problems or mental retardation in specialized housing units that permit these prisoners to enjoy maximum freedom and receive enhanced counseling services away from a general prison population environment where they would be easy targets for assaults, abuse, manipulation, and coercion by predatory prisoners. *See, e.g., Clark v. California*, 1996 U.S. Dist. LEXIS 21630 (N.D. Cal. Oct. 1, 1996) (citing instances of inmates being physically and mentally abused by the general prison population because of their disabilities); *Wilson v.*

Vaughn, 1996 U.S. Dist. LEXIS 22420 (E.D. Pa. Aug. 13, 1996) (describing Department of Corrections policy designed to protect disabled inmates from dangers of general population); Sandra J. Carnahan, *The Americans With Disabilities Act in State Correctional Institutions*, 27 Cap. U.L. Rev. 291 (1996) (describing regulations designed to protect disabled inmates, who are often preyed upon by other violent and manipulative inmates); Elaine Gardner, *Legal Commentary: The Legal Rights of Inmates with Physical Disabilities*, 14 St. Louis U. Pub. L. Rev. 175, 211 (1994). These same practices are brought into question under the ADA's broad-based attack on state sovereignty.

Applied in the prison context, the ADA regulatory scheme would even appear to preclude prison administrators from considering the inmate's history of substance abuse and substance abuse treatment in determining whether to allow the inmate to participate in particular programs: 28 C.F.R. 35.104(1)(ii), (5)(iii) (1999). This is an example of federal imposition of an unwise and dangerous criminal justice policy on the states.

The ADA, thus, requires state prison officials to expend limited state funds in accordance with a high-handed federal regulatory scheme, rather than in accordance with the state's budget priorities and constitutional requirements. The ADA also commandeers local officials to carry out the federal government's agenda by requiring state correctional officials to appoint an ADA coordinator to coordinate the ADA efforts for the corrections

department and to investigate ADA complaints.[4] Yet, the federal government bears none of the cost of such a mandate. The state corrections departments must use their own staff resources, funded by *state* tax dollars, to fill this mandatory position, which can cost a state $100,000 to $150,000 plus benefits. At least one state, Pennsylvania, employs two ADA coordinators, one to oversee employee claims and one to oversee inmate claims. Telephone Interview with Steve Miller, Pa. Dept. of Corrections Employee ADA Coordinator (June 14, 2000). A state corrections department does not even retain the right to use its existing inmate grievance procedures to handle complaints by disabled inmates. *See Purcell v. Pennsylvania Dep't of Corrections*, 1998 U.S. Dist. LEXIS 105 (E.D. Pa. Dec. 29, 1998) (authorizing punitive damage claim for the failure of a state department of corrections to appoint an ADA coordinator even though prison had other officials to resolve inmate disability complaints).

If a state corrections department believes that substantial renovation of an old facility is necessary to

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[4] Section 35.107 states:

> A public entity that employs 50 or more persons shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to it alleging noncompliance with this part or alleging any actions that would be prohibited by this part. The public entity shall make available to all interested individuals the name, office address, and telephone number of the employee or employees designated pursuant to this paragraph. 28 C.F.R. § 35.107(a) (1999).

ensure future compliance with constitutional conditions of confinement, *any* renovations trigger a state obligation to make substantial architectural changes that go well beyond constitutional requirements. In addition to the *program* accessibility requirements of the Act itself, 42 U.S.C. §§ 12101-12213 (1999), the regulatory scheme establishes strict standards for new construction or alterations. Specifically, *all* facilities altered by a state corrections department must be "readily accessible and usable by individuals with disabilities." 28 C.F.R. § 35.151(a) (1999).

A requirement that state prison officials grant prisoners special accommodations in order to avoid ADA litigation or to comply with the ADA also has other adverse effects on prison management. Sound prison management usually requires an orderly prison routine where all prisoners are treated equally. The Act, however, does not simply preclude invidious "discrimination" against disabled prisoners. Rather, the Act is often used to require prison officials to grant special privileges to certain prisoners, or to excuse individual prisoners from complying with generally applicable prison rules. *See Purcell*, 1998 U.S. Dist. LEXIS 105 (authorizing punitive damage claim under the ADA because prison officials did not permit the disabled prisoner to disobey a direct order to report for a medical examination); *Amos v. Maryland Dep't of Public Safety & Correctional Services*, 126 F.3d 589 (1997) (inmates attempt to use ADA to seek transfer to prisons in closer proximity to family residences); *Torcasio v. Murray*, 862 F. Supp. 1482 (E.D. Va.1994), *aff'd*, 7 F.3d 1340 (4th Cir. 1995) (morbidly obese prisoner sought to be

excused from requirement that he stand in line for meals and commissary items).

In prisons, granting special privileges or exempting prisoners from generally applicable requirements is fraught with problems: it can appear that prison officials are engaging in favoritism by granting unwarranted special privileges; it causes resentment among the prison population, which leads to inmate unrest; and it impedes general prison operations when staff must interrupt the normal prison routine. These are decisions left to state officials by the Constitution's inherent federalism principles, and, in the experience of the members of ASCA, rightly so.

The ADA's litigation costs alone place a heavy burden on state prisons. When a prison administrator is confronted with a request to modify a prison practice or procedure for a particular inmate claiming a disability under the ADA, that official is required to weigh whether denying the modification is worth the price of intrusive ADA litigation. The prison official no longer can make decisions based solely upon the people's interests, state law, budget limitations, operational concerns, or the Constitution. Instead, the prison official must also consider the potential administrative burdens of ADA litigation and the potential financial burden of damages and attorneys fees.

The Act's regulatory scheme has armed prison inmates with a litigation weapon that converts a previously frivolous lawsuit into one that can survive pretrial motions and proceed to trial. ADA litigation is extremely fact-intensive, embroiling the federal courts in some of

the most routine prison management decisions. *See, e.g., Torcasio v. Murray,* 862 F.Supp. 1482 (E.D. Va. 1994) (discussing in minute detail a wide range of ADA claims). Given the current provisions of the ADA and regulations, prison administrators can avoid making a modification sought by a prisoner only if the administrator defeats the prisoner's claim of eligibility or meets a high burden of establishing that the proposed modification would fundamentally alter the prison program or service. *See* 28 C.F.R. § 35.130(b)(7). This affirmative defense structure of ADA litigation makes intrusive federal court inquiries necessary to resolve an inmate's claim.

Granting prisoners in state institutions this sort of litigation weapon is a mistake and certainly not mandated by or permissible under the Constitution. Prisoners have demonstrated a historical pattern of clogging the federal court dockets with meritless litigation. *See Carson v. Johnson,* 112 F.3d 818, 822 (5th Cir. 1997) (noting that deterring frivolous and malicious lawsuits by prisoners is a legitimate state interest and the pro se civil rights litigation has become a "recreational activity" for many prisoners); *Procunier v. Martinez,* 416 U.S. 396, 405 n.9 (1974) (noting that the "capacity of our criminal justice system to deal fairly and fully with legitimate claims will be impaired by a burgeoning increase in frivolous prisoner complaints"); *Lewis v. Casey,* 518 U.S. 343, 355 (1996) (noting problems with allowing prisoners to "transform themselves into litigating engines capable of filing everything from stockholder derivative actions to slip-and-fall claims"). Given the number of prisoners who can legitimately claim a disability (even if it is only based upon a *prior* drug addiction), applying the ADA to state prisons

needlessly grants prisoners another weapon for their frivolous litigation arsenal.

Determining that the ADA cannot constitutionally apply to state prisons would not harm any legitimate rights of disabled prisoners. Under the Civil Rights Act, prisoners retain the right to seek injunctive relief and damages for state and federal equal protection violations, cruel and unusual prison conditions, and the denial of adequate medical care. *See* 42 U.S.C. § 1983. Federal courts would still retain the ability to provide prompt and complete relief for actual violations of the constitutional rights of disabled prisoners. Federal courts, however, would be relieved of the obligation to conduct intrusive inquiries into the day-to-day management of the prisons simply to address matters that do not arise to the level of a constitutional violation. Finally the states have the power, if they choose, to protect disabled prisoners more rigorously than the Constitution.

The ADA, as interpreted by the Department of Justice, forces courts to micromanage state and local prisons and intrudes on the state's sovereign and traditional power to govern state prisons in the best interest of their respective citizens. "[A]bsent the most extraordinary circumstances, federal courts are not to immerse themselves in the management of state prisons or substitute their judgment for that of the trained penological authorities charged with the administration of such facilities." *Taylor v. Freeman*, 34 F.3d 266, 268 (4th Cir. 1994) (citations omitted).

SUMMARY OF ARGUMENT

In the state prison context, the ADA is an invalid exercise of Congress's power under Section 5 of the Fourteenth Amendment and therefore violates the Eleventh Amendment, which bars suits by private citizens in federal courts against non-consenting states. *See generally Kimel v. Florida Board of Regents*, 120 S. Ct. 631 (2000); *Florida Prepaid*, 527 U.S. 627 (1999); *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996).

This Court has held that a law passed pursuant to Congress's power under Section 5 of the Fourteenth Amendment must pass a two-step inquiry. *See Kimel v. Florida Board of Regents*, 120 S. Ct. 631 (2000); *Florida Prepaid Post-Secondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999); *Boerne v. Flores*, 521 U.S. 507 (1997). First, there must be evidence of "widespread and persistent" constitutional violations by the states." *Florida Prepaid*, 527 U.S. at 645 (*quoting Boerne*, 521 U.S. at 526); *see also Kimel*, 120 S. Ct. 631. Second, the remedy chosen by Congress must be proportional and congruent to the constitutional wrongs. *See Kimel*, 120 S. Ct. at 635; *Florida Prepaid*, 527 U.S. at 666; *Boerne*, 521 U.S. at 519-520; *see also* Marci A. Hamilton and David Schoenbrod, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment*, 21 CARDOZO L. REV. 469 (1999). The ADA satisfies neither step.

Congress intended to eradicate *all* discrimination against the disabled with the ADA, including a great deal of discrimination that is not unconstitutional. *See* 42 U.S.C. § 12101 (a)(3), (4), (5) (West 1995 & Supp. 1999). As a result, the sweep of the ADA extends well beyond the

boundaries permissible under Section 5 of the Fourteenth Amendment. Nor is the ADA proportional or congruent to any conceivable state constitutional wrongdoing. Its huge coverage and oppressive regime, as applied to state prisons, violates the inherent principles of federalism that limit Congress's exercise of its power under Section 5. Because the ADA is not a valid exercise of power under Section 5, the Eleventh Amendment prohibits private parties from bringing suit in federal court against non-consenting states.

ARGUMENT

I. THE ADA IS NOT A VALID EXERCISE OF CONGRESS'S POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT AND THEREFORE THE ELEVENTH AMENDMENT PROHIBITS SUITS BY PRIVATE PARTIES AGAINST NON-CONSENTING STATES

This Court has held that a law passed pursuant to Congress's power under Section 5 of the Fourteenth Amendment must satisfy a two-part test. *See Kimel v. Florida Board of Regents*, 120 S. Ct. 631 (2000); *Florida Prepaid Post-Secondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999); *Boerne v. Flores*, 521 U.S. 507 (1997). First, there must be evidence of "widespread and persisting" constitutional violations by the states. *Florida Prepaid*, 527 U.S. at 645 (*quoting Boerne*, 521 U.S. at 526); *see also Kimel*, 120 S. Ct. 631. Second, the remedy chosen by Congress must be proportional and congruent to the constitutional wrongs. *See Kimel*, 120 S. Ct. at 635; *Florida Prepaid*, 527 U.S. at 666; *Boerne*, 521 U.S. at 519-520;

see also Marci A. Hamilton and David Schoenbrod, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment*, 21 CARDOZO L. REV. 469 (1999). The ADA fails both requirements.

The ADA was intended to expand the rights of the disabled beyond the Constitution's boundaries. Congress, however, lacks the power to create out of whole cloth new constitutional rights. That power is left to Congress and the states under Article V. *See Boerne v. Flores*, 521 U.S. 507, 529 (1997). "Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." *Florida Prepaid Post-Secondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 638 (1999) (*quoting Boerne*, 521 U.S. at 519). For Congress to exercise its Section 5 power appropriately, there must be proof of a "pattern of constitutional violations," a set of state constitutional violations that rise to a "problem of national import." *Id.* at 627.

In the face of recalcitrant refusal by the states to obey the Constitution's mandates, however, Congress may enact laws forcing the states to obey. On this score, Section 5 of the Fourteenth Amendment states that "[t]he Congress shall have power to enforce [the Fourteenth Amendment] by appropriate legislation." Section 5 corrals Congress into enacting only legislation that is "carefully delimited remediation or prevention of constitutional violations." *Florida Prepaid*, 527 U.S. at 627; *see also* Marci A. Hamilton and David Schoenbrod, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment*, 21 CARDOZO L. REV. 469 (1999).

Under the Eleventh Amendment, Congress may only authorize private suits against the states pursuant to its power under Section 5, and not the enumerated powers. *See generally Kimel v. Florida Board of Regents*, 120 S. Ct. 631 (2000); *Florida Prepaid*, 527 U.S. 627 (1999); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). As a result, if a law is not a valid enactment under Section 5, non-consenting states may not be sued by private parties under that law. The ADA is not a valid exercise of Section 5 power.

A. THE ADA IS NOT BASED ON A HISTORY OF WIDESPREAD AND PERSISTING DEPRIVATIONS OF CONSTITUTIONAL RIGHTS OF THE DISABLED IN STATE PRISONS

This Court has made quite clear that Congress may only employ its enforcement powers under Section 5 of the Fourteenth Amendment when the states have committed "widespread and persistent deprivation of constitutional rights." *Florida Prepaid*, 527 U.S. at 645 (*quoting Boerne*, 521 U.S. at 526); *see also Kimel*, 120 S. Ct. 631. "[F]or Congress to invoke [Section] 5, it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct." *Id.* at 639.

The ADA was enacted not to enforce constitutional guarantees but rather to supplement constitutional rights. 42 U.S.C. § 12101(a)(4) (West 1995 & Supp. 1999). While the term "discrimination" runs through the legislative histories of the ADA and the Rehabilitation Act, it is not shorthand for "unconstitutional discrimination." In fact,

the plain language of the ADA lists many types of discrimination, including discriminatory effects. *See, e.g.*, 42 U.S.C. §§ 12101(a)(3), (5) (1999). The ADA does not supplement available constitutional remedies for the purpose of eradicating unconstitutional state conduct but rather does what Congress may not: "enforce a Constitutional right by changing what the right is." *Boerne*, 521 U.S. at 519. *See also Kimel*, 120 S. Ct. at 644 ("[Congress] has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation" (*quoting Boerne*, 521 U.S. at 519)); *Florida Prepaid*, 527 U.S. 638.

The ADA was intended to rid the United States of *all* discrimination against the disabled, whether that discrimination was constitutionally permissible or not. Congress found that "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs or other opportunities." 42 U.S.C. § 12101 (a)(5); H.R. Rep. 101-485(III) (1990) *reprinted in* 1990 U.S.C.A.A.N. 449 (stating the purpose of ADA "is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities"). Congress's blunderbuss approach violates the Constitution's inherent principles of federalism.

The ADA was passed as though discrimination on the basis of disability is on the same constitutional plane as discrimination on the basis of race. "The Americans

with Disabilities Act completes the circle begun in 1973 with respect to persons with disabilities by extending to them the same civil rights protections provided to women and minorities beginning in 1964." H.R. Rep. No. 101-485(III), at 26 (1990), *reprinted in* 1990 U.S.C.A.A.N. 449.

This Court has made abundantly clear that the two forms of discrimination do not receive the same constitutional treatment under the Equal Protection Clause. *Compare City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505-06 (1989), *with City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442-43 (1985). Therefore, disabilities legislation passed pursuant to Section 5 that uses the tools intended to remedy racial discrimination is constitutionally suspect. *See Kimel*, 120 S. Ct. at 646; *Florida Prepaid*, 527 U.S. at 639; *Boerne*, 521 U.S. at 519-20.

Intentional racial discrimination is subjected to the most searching judicial scrutiny, whether the legisation is intended to harm or to benefit the races being targeted. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995); *City of Richmond v. J.A. Croson*, 488 U.S. 469, 493 (1989). By comparison, intentional discrimination on the basis of disability has been subjected to a considerably lower level of scrutiny, the rational basis test. *Cleburne*, 473 U.S. at 449. Regulations affecting prisons also have been subjected to low level scrutiny. *Turner v. Safley*, 482 U.S. 78 (1987); *see also O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1989).

The constitutionality of discriminatory effects has been treated by this Court as a separate category from

intentional discrimination. Even in the racial discrimination context, discriminatory effects have not triggered strict scrutiny. *Washington v. Davis*, 426 U.S. 229, 242-244 (1976) ("Disproportionate impact is not irrelevant, but, it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, that racial classifications are to be subjected to the strictest scrutiny"). Laws that do not intentionally discriminate against the disabled – but rather only incidentally affect the disabled – have not been the subject of a Supreme Court case. It is a certainty, however, that the Constitution would not require a higher level of scrutiny for discriminatory effects than it does for intentional discrimination. In the disability context, this means that any law that incidentally affects the disabled will be scrutinized under the Constitution for a rational basis at most. The mandatory accommodation regime of the ADA wades far beyond such a standard.

Some have attempted to bootstrap disabilities into the same position under the Equal Protection Clause as race by labeling those with disabilities as a "discrete and insular minority." There are two fundamental problems with this approach. First, this argument assumes that footnote four of *U.S. v. Carolene Products*, 304 U.S. 144, 153 (1938), is the decisive interpretive tool of the Equal Protection Clause. Such a claim, however, is a reach, to say the least. *Cf.* John Hart Ely, *The Supreme Court, 1977 Term – Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 10, 14-15 (1978) (stating that this Court has not followed the *Carolene Products* footnote four approach.)

Second, the range of disabilities potentially covered by the ADA – which is made so stark in the prison

context – is so huge that those covered by the Act are not an identifiable, discrete, or insular collective. Indeed, the potential sweep of the ADA is so broad that one of the most litigated issues under the ADA is whether the particular problem claimed by the person is a disability for purposes of the ADA. *See, e.g., Sutton v. United Air Lines,* 527 U.S. 471 (1999) (holding that nearsightedness is not a disability); *see also Cassidy v. Indiana Dep't of Corrections,* 199 F.3d 374 (7th Cir. 2000) (inmates' claim of emotional distress insufficient to sustain claim under ADA).

B. THE ADA IS NOT PROPORTIONAL OR CONGRUENT TO ANY CONCEIVABLE CONSTITUTIONAL VIOLATIONS BY THE STATE PRISONS

Under Section 5 of the Fourteenth Amendment, Congress must make its legislation redressing state constitutional wrongdoing proportional and congruent to the type and degree of wrongdoing. *See Kimel,* 120 S. Ct. at 635; *Florida Prepaid,* 527 U.S. at 666; *Boerne,* 521 U.S. at 519-520; *see also* Marci A. Hamilton and David Schoenbrod, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment,* 21 CARDOZO L. REV. 469 (1999). Like the Religious Freedom Restoration Act invalidated in *Boerne,* the ADA's sweep is so far beyond the constitutional requirements that it cannot be a valid exercise of Congress's power under Section 5 to remedy constitutional violations. *See Boerne,* 521 U.S. at 532.

With the ADA, Congress did not attempt to fit a remedy to perceived constitutional wrongs, but rather sought to expand the rights of the disabled well beyond

constitutional guarantees. The ADA, as handled by the Department of Justice, requires state prison systems to conform to precise standards derived by the DOJ that far exceed the requirements of the Equal Protection Clause.[5] *See, e.g.*, 36 C.F.R. § 1191.1, at App. A (1999) (providing, *inter alia*, that carpet must have a maximum thickness of no more than 1/2 inch, and that the spout of a drinking fountain must provide a flow of water at least 4 inches high).

The experience of the state prisons that have labored under the ADA proves that there is nothing congruent or proportional about the ADA's mandatory accommodation requirement, which reaches well beyond correcting or preventing unconstitutional discrimination on the basis

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[5] Were this Court to uphold the ADA as a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment, many of the regulations implementing the ADA do not deserve deference and would be vulnerable to attack as unconstitutional delegations of legislative power. While the plain language of the Act requires "reasonable accommodation," the Department of Justice has transformed that language into mandatory, unreasonable accommodation, effecting an unconstitutional delegation of power and an interpretation that does not deserve deference. *See Sutton*, 527 U.S. at 482 ("impermissible interpretation" of plain language of ADA precludes deference to agency's interpretation of ADA); *American Trucking Ass'n v. EPA*, 175 F.3d 1027, 1033 (D.C. Cir. 1999) (finding EPA's construction of Clean Air Act an "unconstitutional delegation of legislative power"), *cert. granted, Browner v. Amer. Trucking Ass'ns*, 120 S. Ct. 2003 (2000); *Amer. Trucking Ass'ns v. Browner*, ___ S. Ct. ___, 2000 U.S. Lexis 3629 (No. 99-1426). The DOJ's "formulation of its policy judgment leaves it free to pick any" accommodation pleasing to itself without meaningful consideration of what is reasonable in the prison context. *See American Trucking*, 175 F.3d at 1037.

of disability. In the state prison context, the ADA is an immodest, incongruent, and disproportional attack on state sovereignty.

CONCLUSION

The ADA is an affront to the states' sovereign authority to operate state prisons and to regulate those imprisoned for violating state laws. In the state prison context, the ADA is an invalid exercise of Congress's power under Section 5 of the Fourteenth Amendment and therefore violates the Eleventh Amendment, which bars suits by private citizens in federal courts against non-consenting states.

Respectfully submitted,

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